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IN THE

Supreme Court of the United States

October Term, 1960

No. 373

ROY R. TORCASO,

Appellant,

against

CLAYTON K. WATKINS, Clerk,

Appellee.

On Appeal from the Court of Appeals of the State of Maryland

BRIEF OF AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, and UNITARIAN FELLOWSHIP FOR SOCIAL JUSTICE, *AMICI CURIAE*

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United States Constitution, Amendment XIV 5, 6, 16, 21, 23, 24
United States Constitution, Art. VI 6, 20, 21, 23

Virginia, Hening's Statutes of (1823) 19

Other Authorities:

Archer, John Clark, Faiths Men Live By, Thomas Nelson & Son, New York (1934) 12

Braden, Charles Samuel, These Also Believe, The Macmillan Co., New York (1949) 11
Burtt, Edwin A., Types of Religious Philosophy, Harper & Bros., New York (1939) 11

PAGE

Encyclopedia of Religion, Ferm, Vergilius, editor, Philosophical Library, Inc., New York (1945) 10, 11
Encyclopedia of the Social Sciences (1935 ed.) 9
Evans, Bergen, and Evans, Cornelia, Dictionary of Contemporary American Usage, Random House, New York (1957) 8

Greenberg, Jack, Race Relations and American Law, Columbia University Press, New York (1959) 25

Johnson, Alvin W., and Yost, Frank H., Separation of Church and State, University of Minnesota Press, Minneapolis (1948) 18

Leuba, James H., The Reformation of the Churches, Beacon Press, Boston (1950) 11
Life Magazine, February 7, 1955 9, 10

Moehlmann, Conrad Henry, Religion in the Twentieth Century, Ferm, V., Editor, The Philosophical Library, Inc. (1948) 11

Randall, Henry Stephens, The Life of Thomas Jefferson, Derby and Jackson, New York (1858) 19

"State Decisions in Federal Courts," Anno., 83 L. ed. 520 (1938) 8
Stokes, Anson Phelps, Church and State in the United States, Harper & Bros., New York (1950) 18, 19, 20
Story, Joseph, Commentaries on the Constitution of the United States, Hillard, Gray and Co., Boston (1833) 23
Sweet, William Warren, The Story of Religions in America, Harper & Bros., New York (1930) 11

Webster's New World Dictionary, Encyclopedic Ed. (1951) 8
Wieman, Henry Nelson, The Wrestle of Religion with Truth, Macmillan, New York (1928) 10

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AMICI CURIAE

Interest of the *Amici*

We deem it appropriate to state at the outset that the constituency of each of the *amici* includes vast numbers of people who not only believe in the existence of God, but also devoutly worship God.

The American Jewish Committee, formed in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

> The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto.

The B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a membership of more than 350,000 men and women and their families. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance goodwill and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is, therefore, dedicated to the protection of freedom of religion and combatting religious discrimination.

The Unitarian Fellowship for Social Justice was established in 1908 by Dr. John Haynes Holmes and other Unitarians. It welcomes all who seek to transform their ideals of social justice into living reality. Its purpose is "to provide a channel for united action in behalf of social justice and to enable its members to sustain one another in the application of their religious ideals to the needs of the times."

It has been among the fundamental tenets of the organizations which appear as *amici curiae* herein that the welfare and the security of members of minority religious groups in the United States depend upon the preservation of constitutional guarantees for all; that an invasion of the rights of any religious group is ultimately a threat to the religious freedom of all groups and to the individual members thereof.

The holding of the Maryland Court of Appeals was that under the State Constitution disbelief in the existence of a Supreme Being renders a person incompetent to hold

public office. The Court stressed that religious toleration did not, at least in the State of Maryland, "encompass the ungodly." In the course of its decision, the Court of Appeals equated disbelief in a Supreme Being with "the denial of any moral accountability for conduct * * *."

While this case directly affects the right of one who does not believe in the existence of God, to hold a position as Notary Public, the grounds of the decision and the constitutional provision sustained by the Court below affect many persons with unorthodox or non-theistic religious beliefs. Notwithstanding the fact that the *amici curiae* herein are organizations of people who believe in God, the decision of the Maryland Court of Appeals is a matter of deep concern to them because they believe that it limits the possibility of different views of the relationship of God and man. If a division of government is permitted to define what is orthodox in religious beliefs, it may some day attempt to define heresy. Minority religious groups can prosper only in an open society where each man's conscience, and not the state, determines what, if any, shall be his relationship to ultimate causes. Therefore, the *amici* fear that if the state, through administrative, judicial or legislative action can determine today that members of a group must be theistic to enjoy the benefits of public employment, then a precedent will be created under which the state may attempt, at some future time, to dictate the nature of the Supreme Being in which people must believe in order to be accepted as full citizens in our society.

The *amici* who have joined in this brief agree with the late Mr. Justice Jackson who said that the "day that this country ceases to be free for irreligion, it will cease to be free for religion—except for the sect that can win political power." *Zorach* v. *Clauson*, 343 U. S. 306, 325 (1952).

For these reasons, the American Jewish Committee, the Anti-Defamation League of B'nai B'rith and the Unitarian Fellowship for Social Justice join in filing this brief *amici curiae* with the consent of the parties.

Statement of the Case

The facts of this case are undisputed. The Governor of Maryland appointed the appellant, upon his proper application, to the position of Notary Public in and for Montgomery County (T. 2).[1] In accordance with instructions, the appellant presented himself to the appellee, the Clerk of the Circuit Court for such county, to obtain his commission. The appellee asked the appellant to subscribe to the following oath and declaration:

State of Maryland }
Montgomery County } ss.:

In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of

Notary Public of
The State of Maryland
in and for
Montgomery County

according to the Constitution and Laws of this State. I, Roy R. Torcaso, do declare that I believe in the existence of God.

_____

Sworn to and subscribed before me, Clerk of the Circuit Court for Montgomery County, at Rockville, Maryland, this _____ day of _____ AD, 19_____

TEST:

_____ Clerk (T. 3)

1. The capital letter T followed by a number, refers to the page of the printed Transcript of Record.

The appellant refused to subscribe to the declaration concerning his belief in the existence of God because he does not believe in the existence of God. Thereupon, the appellee refused to issue the commission to the appellant, who then filed a petition for writ of mandamus in the Circuit Court for Montgomery County, asking that the appellee be directed to issue the commission of Notary Public to the appellant (T. 1-5). Upon demurrer (T. 6), the Circuit Court dismissed the petition (T. 7-11).

The appellant appealed to the Maryland Court of Appeals which affirmed the lower Court's decision (T. 12-19). The opinion of the Court below appears at 223 Md. 49. The appellant, thereupon, appealed to this Court which noted probable jurisdiction on November 7, 1960 (T. 23).

The Question Presented

This case presents this Court with the question whether a provision of a state constitution, requiring a declaration of the belief in the existence of God as a prerequisite for any public office of profit or trust, is in conflict with the establishment of religion and free exercise clauses of the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution (T. 21).

Summary of Argument

Article 37 of the Declaration of Rights of the Maryland Constitution establishes a religious standard for public office, thereby penalizing persons on religious grounds in violation of the First Amendment to the United States Constitution. The requirement applies not only to notaries public but to all state offices, including members of the state legislature, judges and school teachers. It incapaci-

tates not only atheists but also agnostics, persons who have doubts as to what the term "God," as used in Article 37, means and adherents of non-theistic religions.

The First Amendment, made applicable to the states by the due process clause of the Fourteenth Amendment, prohibits by its establishment clause laws aiding all religions, as well as laws under which a person may be punished for professing religious beliefs or disbeliefs. While *Zorach* v. *Clauson*, 343 U. S. 306 (1952) permitted the state to accommodate some of its functions to the spiritual needs of religious groups, Article 37 does more than that; it incapacitates and penalizes persons on religious grounds. Thus, it also violates the free exercise clause of the First Amendment. Furthermore, Article 37 affects freedom to believe which is absolute.

Religious tests were crucial issues in the struggle for religious freedom in the United States. The Virginia Bill for Establishing Religious Freedom outlawed religious tests and was the precursor of Article VI of the Federal Constitution. The First Amendment expanded and broadened this aspect of religious freedom and necessarily includes the prohibition on religious tests.

The constitutional infirmity of Article 37 is demonstrated by Article 36 of the Declaration of Rights of the Maryland Constitution which incapacitates non-believers in God from giving testimony in civil or criminal courts, thus stripping such persons of the essential attributes of citizenship.

Whether public employment is regarded as a right or a privilege, qualifications established by the state for such employment must accord with constitutional requirements of due process and equal protection. Article 37, by incapacitating persons who are unwilling to express belief in God, from being appointed to public office, is arbitrary and discriminatory in that it bars persons on religious grounds and thus violates the Fourteenth Amendment.

ARGUMENT

POINT I

Maryland's constitutional requirement of a declaration of belief in the existence of God as a prerequisite for public office violates the First Amendment of the United States Constitution.

A. Scope and Meaning of Article 37 of the Declaration of Rights of the Maryland Constitution

Article 37, which appears in the Declaration of Rights of the Maryland Constitution, reads as follows:

> That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution.

By its very language, the declaration of belief in the existence of God, which Article 37 characterizes as a "religious test," is required not only of notaries public, but for all offices of "profit or trust" in the State of Maryland. Thus, members of the state legislature, judges, lawyers, public school teachers, municipal employees and all other persons on the public payroll or holding any official title may be required to declare their belief in the existence of God to qualify for office. The Court of Appeals of Maryland, which has "the last word" in ascertaining the meaning of the State Constitution, has interpreted Article 37 in its opinion below (T. 16), as a self-executing requirement for "every official" and thus precluded this Court from interpreting Article 37 as permissive rather than mandatory. *Watson* v. *Buck*, 313

U. S. 387, 401 (1941); *Speiser* v. *Randall*, 357 U. S. 513 (1958); Anno., 83 L. Ed. 520, 521-22 (1938).

The petitioner in the instant case is an atheist, a term which has been defined judicially as describing "one who does not believe in the existence of a God." *Gibson* v. *American Mutual Life Ins. Co.*, 37 N. Y. 580, 584 (1868).

The constitutional requirement of Article 37, however, has a much broader sweep. It disqualifies all "who do not express their feeling toward ultimate issues of existence in any creedal form" *Everson* v. *Board of Education*, 330 U. S. 1, 45 (1947) or who "profess a * * * disbelief in any religion" (*id*, at 15). Agnostics, infidels, humanists, persons with doubts as to the meaning of "God" as used in Article 37 and adherents of non-theistic religions would be barred.

a. An agnostic is defined in Webster's *New World Dictionary*, Encyclopedic Edition (1951), as a person who thinks it is impossible to know whether there is a God or a future life, or anything beyond material phenomena. The word was apparently coined by Thomas Henry Huxley in 1869 to describe one who felt that the ultimate nature of things, including the existence of a God, is "unknown and probably unknowable." Evans and Evans, *Dictionary of Contemporary American Usage*, p. 21.

b. An infidel is "an unbeliever." The word was, until recently, applied by Christians to Mohammedans and "among Mohammedans to Jews and Christians." In recent years, there has been a tendency to give the word "a wider significance and have it apply to agnostics and atheists." *id.* at 21.

c. Humanists have been described as those with a "temperamental resistance to ecclesiastical and political authority." Humanists include those with a "conviction that man himself is the center of the Universe." Humanism is "a

basis for certain modern schools of philosophy and religion". 7 *Encyclopedia of the Social Sciences*, 540 (1935 ed.). "In the main it has been antagonistic to positive and authoritative religious belief." *ibid.*

d. Of course, the term "God" as used in the Maryland Constitution is not readily definable. It carries with it centuries of philosophical and theological disputation and varies in meaning not just from one sect to another, but from one individual to another. Any one who has genuine doubts concerning the meaning of the term as used in Article 37, might consider himself unable to make the declaration in good faith, even though he himself may believe in a Creator, a Supreme Being or Divine Providence.

e. An imposing list of distinguished authorities, writers, scholars, and teachers can be cited in support of the proposition that belief in a Supreme Being is not essential to religion. These views are assembled in places ranging from popular journals to technical disquisitions. *Life* magazine, on February 7, 1955, introduced its distinguished series of articles on "The World's Great Religions" in this way:

> Here will be set forth the religious beliefs and customs of most of the world's people.
>
> The faiths of more than half of these people are alien to Western Civilization. However unfamiliar their beliefs and however divided into religions and sects, these people seek truth. But truth means different things to different people—the word truth itself having different connotations in the civilizations of the East from those of the West. But always it means a search for answers to the mysteries of reality, of the soul, of the purpose of life. This goal takes man on many paths—the direct way of simple faith, the byway of metaphysics. (p. 57).

The editors of *Life* avoided defining religion in terms of the God concept. On the contrary, *Life* (having relied on painstaking research)[2] interpreted the term religion as including those movements seeking various answers to the "mysteries of reality, of the soul, of the purpose of life."

Henry Nelson Wieman, formerly of the University of Chicago Divinity School, writes:

> In many religions, the most sustaining and protecting behavior is called God. But whether it is called God or not, every religion either finds or searches for something that will provide these major goods and save from these major evils. Wieman, *The Wrestle of Religion with Truth*, p. 135.

Professor Vergilius Ferm, Compton Professor and head of the Philosophy Department at the College of Wooster, Ohio, and one of this country's authorities on church history, in his article "Religion, the Problem of Definitions," in the *Encyclopedia of Religion* (1945) lists among the common errors made in attempts to define religion: the inadequacy of reliance upon etymology; the use of definitions which suffer from vagueness, narrowness, or from such broadness as to lose all significance; the failure to recognize that religion affects all of man's being and not merely his beliefs or his feelings or his activities. Listed by Ferm as a "tenth mistake" is the definition of the term religion in connection "with a God concept."

> Two considerations appear here: how are those persons to be classified who behave in ways very much like conventional religious theists but who do not believe in God (in any conventional sense)?

---

2. In the "Credits" listed in the preface to the bound volume based on the magazine series, subsequently published by Time Incorporated, indebtedness for contributions and assistance was noted to some of the most prominent religious authorities and institutions in the world.

Furthermore, a person may well assert his belief in a deity without his being religious.

* * * *

In light of the above * * * the following statements seem wholly justifiable: "*To be religious* is to effect in some way and in some measure a vital adjustment (however tentative and incomplete) to whatever is reacted to or regarded implicitly or explicitly as worthy of serious and ulterior concern." Again, "*a religion* is a set of meanings and behaviors having reference to individuals who are or were or could be religious." Again, "religion is a generic term referring to all conceivable religions; formal or informal." (italics in the original.) Ferm, *Encyclopedia of Religion*, p. 646-7.

Professors Conrad Henry Moehlmann of Rochester Theological Seminary,[3] William Warren Sweet of the University of Chicago,[4] Edwin A. Burtt of Cornell University,[5] Charles Samuel Braden of Northwestern University,[6] James H. Leuba of Bryn Mawr College,[7] and other teachers and writers on religion and church history recognize that non-theistic religions exist in the United States today, that they are a development of the liberal churches, and that some of them not only doubt but even deny the existence of any God "other than the God resident in the human will-to-goodness." Sweet, *The Story of Religions in America*, p. 514 ff.

It is thus clear that there are many distinguished theological authorities, teachers and scholars who define reli-

3. *Religion in the Twentieth Century*, Ferm, editor, p. 266.

4. *The Story of Religions in America*, p. 514 ff.

5. *Types of Religious Philosophy*, p. 350 ff.

6. *These Also Believe*, p. 468.

7. *The Reformation of the Churches*, pp. 21 ff., 201.

gion in terms other than those involving belief in a God or Supreme Being.

Not only atheists and agnostics, but many deeply religious people who seek the explanation of ultimate causes in non-theistic terms, would thus be disqualified under Article 37 of the Maryland Constitution. Among such people would be followers of the Ethical Culture Movement, Secular Humanists, Taoists, Buddhists and others. *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127 (1957); *Fellowship of Humanity* v. *County of Alameda*, 153 A. C. A. (Cal.) 755 (1957); Archer, *Faiths Men Live By* (1934), p. 272.

B. The "Establishment of Religion" Clause of the First Amendment

The first Amendment to the United States Constitution provides, in part, as follows:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof • • •

This provision against action by Congress has been held equally applicable to action by the states or any of their political subdivisions. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

The "establishment of religion" clause has been defined by this Court in three recent decisions: *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948) and *Zorach* v. *Clauson*, 343 U. S. 306 (1952). There was no disagreement between the majority and minority opinions in *Everson* on the following definition:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor

the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." 330 U. S. at 15-16; see also 41, 52, 53, 59, 60.

In *McCollum* this definition of the establishment clause was the basis for a determination that a released time program in the public schools of Champaign, Illinois violated the First Amendment. Under that program, children attending public schools were released one hour during each week to receive religious instruction within the school buildings from teachers provided and paid by religious groups. In an eight to one decision, this Court struck down that plan quoting with approval the *Everson* definition of "establishment of religion." 333 U. S. at 210-211.

This Court's interpretation of the meaning of "establishment of religion" was in no way weakened or modified by its subsequent decision in *Zorach* v. *Clauson, supra*, upholding the New York released time program. This Court distinguished the facts in that case from those in the *McCollum* case, since the New York program did not involve use of public school buildings for religious instruc-

tion. The Court expressly re-affirmed the principle enunciated in *Everson* and *McCollum*—"We follow the *McCollum* case." *Zorach* v. *Clauson*, 343 U. S. at 315.

In *Zorach*, this Court refused to strike down a program of off-premises released time for religious education on the ground that the institutions of the State were merely making an "adjustment" to "accommodate the religious needs of the people." at 315. The opinion stressed the voluntary nature of the program. The majority argued that to hold otherwise on the facts before the Court "would be preferring those who believe in no religion over those who do believe." at 314.

None of these arguments is applicable here. Article 37 of the Declaration of Rights of the Maryland Constitution involves no "adjustment" or "accommodation"; it incapacitates from holding public office those who fail to meet a religious test—belief in the existence of God. It is not voluntary, but coercive. Without exceptions, it bars persons who cannot meet the religious test from holding any public office of trust or profit. Far from preventing preferential treatment of non-believers over believers, Article 37 denies equality of treatment to believers and non-believers. In fact, it prefers believers over non-believers and thus is blatantly inconsistent with *Everson*, *McCollum* and *Zorach*. As this Court there held, the First Amendment bars any State from preferring "one religion over another" without distinguishing between theistic and non-theistic religions. The states are further barred from punishing any person "for entertaining or professing religious beliefs or disbeliefs * * *." *Everson* v. *Board of Education*, 330 U. S. at 15-16.

The majority opinion in the *Zorach* case, in the course of discussing off-premises released time programs for religious education, said: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U. S. at 313. Obviously, all that Mr. Justice Douglas intended to express was the thought that a ma-

jority, perhaps a vast majority, of our people are members or adherents of those religious sects and denominations which predicate their beliefs on the existence of a Supreme Being. Certainly, he could not have intended to say that every one of our people believes in the existence of a Supreme Being or that the failure of a person so to believe may be the basis for depriving him of First Amendment rights—which is the effect of Article 37. Hence, when the Court of Appeals of Maryland cited that sentence from *Zorach* in its decision sustaining Article 37 (T. 18), it read into the sentence a meaning which neither its author nor this Court could have intended.

C. The "Free Exercise" Clause of the First Amendment

The purpose of both the "establishment" and the "free exercise" clauses of the First Amendment is to assure religious freedom. This Court in *Everson* characterized these two clauses as "complementary" and reaffirmed their interrelationship. 330 U. S. at 15. The objective of the First Amendment was there declared to be to secure "religious liberty from the invasion of the civil authority."

Thus, the First Amendment places religious beliefs or disbeliefs completely "beyond the reach of law." Government is barred from interfering "with organized or individual expression of belief or disbelief." *Minersville School District* v. *Gobitis*, 310 U. S. 586, 593 (1940).[8] This restriction rests, not upon any hostility to religion, but upon the "premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum* v. *Board of Education*, 333 U. S. at 212. As Mr. Justice Frankfurter wrote in his concurring opinion in

8. The holding in *Minersville School District* v. *Gobitis* was overruled in *West Virginia State Board* v. *Barnette*, 319 U. S. 624 (1943), not because of disagreement with the quoted language, but because the earlier decision was considered insufficiently protective of the constitutional guarantee of religious freedom.

McCollum (at 232): "We have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion," citing *Everson* v. *Board of Education*, 330 U. S. at 59.

The "liberty" guaranteed to every person by the Fourteenth Amendment against deprivation without due process of law, places the state governments in the same position as the federal government with respect to their incompetence to legislate on religious beliefs or disbeliefs. *Cantwell* v. *Connecticut, supra; Murdock* v. *Pennsylvania, supra; McCollum* v. *Board of Education, supra.*

A constitutional provision which disqualifies a person from public office because of his beliefs or disbeliefs concerning his relationship to ultimate causes, penalizes him for religious convictions. Such a disqualification restricts freedom of religion just as effectively as though the state were to impose a tax upon those holding unorthodox religious views or were to deny them tax exemption allowed to orthodox religious groups.

In *Speiser* v. *Randall*, 357 U. S. 513 (1958), this Court was called upon to determine whether the First Amendment's guarantee of freedom of speech was violated by a statute of the State of California requiring applicants for tax exemption to declare that they do not engage in certain activities involving advocacy of political beliefs.

In that case, this Court said that a discriminatory denial of tax exemption for advocacy "is a limitation on free speech." *Speiser* v. *Randall*, 357 U. S. at 518.

The Court recognized the capacity of the taxing power to limit free speech:

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. *Ibid.*

Just as the petitioner in *Speiser* v. *Randall* was penalized by the withholding of tax exemption for the exercise of his constitutionally protected right of freedom of speech, so in the case at bar the petitioner is penalized by the withholding of public office for the exercise of his equally protected right of freedom of religion. Certainly, no distinction can be drawn between the two cases because *Speiser* involved freedom of speech and the case at bar involves freedom of religion.

In *Speiser* v. *Randall* this Court assumed, without deciding, that a state could withhold tax exemption and thus limit freedom of speech where it takes the form of an activity for which the speaker "might be fined or imprisoned." 357 U. S. at 520. We are aware of *Dennis* v. *United States*, 341 U. S. 494 (1951) in which this Court interpreted the "clear and present danger" doctrine in relation to freedom of speech. But we submit that it would be absurd to claim that Article 37 can be sustained on the theory that the absence of belief by any individual in the existence of God constitutes a "clear and present danger" to the State. Furthermore, it should be noted that Article 37 is not concerned with action, but with mere belief. While "conduct remains subject to regulation for the protection of society," freedom of belief, this Court has held, "is absolute." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). See also, *Reynolds* v. *United States*, 98 U. S. 145 (1878). This rule has been recognized in Maryland. *Hopkins* v. *State*, 193 Md. 489, 496 (1949):

A requirement of belief in the existence of God, such as appears in Article 37, poses a real dilemma for many persons with unorthodox religious beliefs. Their choice is to resign themselves to disqualification for any office of trust or profit under the State or to conceal or betray their deepest convictions. Under the First Amendment, no State should be permitted to require such a choice of its citizens. Whether a person does or does not believe in God, as well as the kind of God in which he believes, is

beyond the competence of state scrutiny in our constitutional democracy. The late Mr. Justice Jackson affirmed this principle in his ringing statement:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 643 (1943).

D. The Constitution and Religious Tests for Office

Religious tests for public office were characteristic in England and in its colonies in the New World as devices to exclude those whose religious beliefs did not conform to the sects established or recognized by the ruling authorities. In pre-Revolutionary War days, Maryland and Massachusetts required a belief "in the Christian religion" while Georgia, New Hampshire, New Jersey and North Carolina required a belief in Protestantism as a test for public office holders. Pennsylvania required a belief that God was "the rewarder of the good and the punisher of the wicked." Stokes, *Church and State in the United States*, Vol. I., p. 274 (1950). Jews were permitted to hold public office only in Rhode Island, New York, New Jersey and Virginia. Johnson and Yost, *Separation of Church and State*, p. 25 (1948). As late as 1776, Delaware adopted a requirement that all seekers for public office certify their "faith in God the Father, and in Jesus Christ, His only Son, and in the Holy Ghost, one God, blessed forever more." 1 Stokes, *supra*, 274.

Such restrictions on qualifications for public office, understandably, became onerous in the multisectarian, plur-

alistic society which came to exist in the colonies. The problem was first tackled in Virginia where the establishment of the Church of England led to persecution and oppression until just before the Revolutionary War. In 1785, the Virginia Assembly adopted a bill for establishing religious freedom which became law on January 16, 1786. While Jefferson was almost entirely responsible for its composition, Madison was the leading force in carrying it through the Assembly. 1 Stokes 392; Randall, *The Life of Thomas Jefferson*, Vol. 1, pp. 219-220 (1858). In its preamble, the bill stated: "That all attempts to influence [the mind of man] by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness * * *." The preamble further stated that: "Proscribing any citizen as unworthy the public confidence by laying upon him an incapacity, of being called to [the] offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injurously of those privileges and advantages to which, in common with his fellow-citizens, he has a natural right." And the preamble also stated that "the opinions of man are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on [the] supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty * * *." XII Hening's Statutes of Virginia (1823) 84.

The momentum of the Virginia struggle for religious liberty carried over into the Constitutional Convention in which members from Virginia played a prominent part. On May 29, 1787, Charles Pinckney of South Carolina proposed for formal consideration the following language:

> The Legislature of the United States shall pass no law on the subject of religion.

The proposal was referred to the committee of the whole house. On July 24, 1787, this committee was discharged from further consideration of Pinckney's proposal. It was then turned over to the committee on detail appointed to draft the Constitution on the basis of the Convention's proceedings. Nothing more is recorded of this proposal in the accounts of the Convention.

On August 20, 1787, Charles Pinckney placed a second and narrower proposal before the Convention:

> No religious test or qualification shall ever be annexed to any oath of office under the authority of the United States.

On August 30, this proposal, with some minor changes, was adopted unanimously for inclusion in the Constitution. It became the last clause of the third paragraph of Article VI. 1 Stokes, *supra*, 526-7.

The omission from the Constitution of specific guarantees of a number of basic freedoms led some states to insist upon the adoption of such guarantees as a condition to their ratification. Several of the states insisted on broader guarantees of freedom of religion than that provided by the ban on a religious test for office in Article VI. Rutledge, dissenting opinion in *Everson* v. *Board of Education*, 330 U. S. at 39. The ultimate result was the religious clause incorporated in the First Amendment, which strongly resembles Pinckney's suggested language and which, like the latter, is a model of brevity and conciseness:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *

While the prohibition of Article VI deals with one specific aspect of the establishment of religion—qualifications for public office—the First Amendment expands and broad-

ens this prohibition. It bans any aspect of the establishment of religion. Its guarantee outlaws every device which has traditionally been used to place dissenters and adherents of religious minorities in a disadvantageous position, as compared with members of the dominant group or groups. One of these devices, used extensively throughout colonial times, was the religious test as a prerequisite for public office. It is inconceivable that the prohibition against religious tests should not be considered to be embraced within the broader guarantees against any establishment of religion and assuring its free exercise as contained in the First Amendment. Even if Article VI had never been part of the original Constitution, certainly religious test oaths would have been banned as a result of the enactment of the First Amendment.

The prohibitions of the First Amendment, originally addressed to Congress and the federal Government, were later held by this Court to be applicable to the states through the due process clause of the Fourteenth Amendment. *Cantwell* v. *Connecticut, supra; Murdock* v. *Pennsylvania, supra; Everson* v. *Board of Education, supra; McCollum* v. *Board of Education, supra.* Hence, the states, as well as the federal government, are barred from imposing religious qualifications of any kind as a condition for public office. Article 37 of the Declaration of Rights requiring a declaration of belief in the existence of God from every applicant for an office of profit or trust is in irreconcilable conflict with this ban.

E. Article 36 of the Declaration of Rights of the Maryland Constitution

To support its decision upholding the constitutionality of Article 37, the Maryland Court of Appeals referred to Article 36 of the Declaration of Rights of the State Constitution which, after guaranteeing "religious liberty," provides:

> • • • nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come.

Far from supporting the position of the respondent, we believe Article 36 proves the vice of constitutional provisions examining into the religious beliefs, convictions or motivations of people, or the absence thereof. Under the express language of Article 36, as interpreted by the Maryland Court of Appeals, a person unwilling to certify to his belief in God is disqualified, not only from holding any public office of profit or trust, but also from giving testimony in any civil or criminal proceeding. *Torcaso* v. *Watkins*, 223 Md. 49, 59 (1960) (T. 19). This could include a lawsuit to which he is a party and to the success of which his testimony may be essential. The limitations imposed by Article 36 upon those who cannot conscientiously declare their belief in the existence of God, are far-reaching indeed. A citizen who is incapacitated from using the civil courts to protect and defend his rights and property is but a step above an outlaw.

What would happen, one might speculate, if a member of the Ethical Culture Society, a secular humanist or a Buddhist were charged with a crime in Maryland, or was plaintiff or defendant in civil litigation, and wanted to testify in his own behalf?

POINT II

Maryland's constitutional requirement of a declaration of belief in the existence of God as a prerequisite for public office violates the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution.

Whether the opportunity to hold a public office of trust or profit is classified as a right or a privilege, it is clear that the state may not establish conditions for such employment which are unreasonable, unlawful or discriminatory. Once the state undertakes to establish criteria for filling public office, it is bound by the Fourteenth Amendment's due process and equal protection clauses in the formulation of those criteria. *Slochower* v. *Board of Higher Education of the City of New York*, 350 U. S. 551, 555 (1956). The establishment of any arbitrary or unreasonable standard for public office violates due process. *Wieman* v. *Updegraff*, 344 U. S. 183, 192 (1952).

A religious test for public office has always been deemed unreasonable under our constitutional democracy. The prohibition on such tests in Article VI of the Constitution clearly demonstrates this.

> The Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship. Story, *Commentaries on the Constitution of the United States*, Sec. 1879.

In a country without an established religion, where religious belief or disbelief is accepted as a private matter for the individual and his own conscience, philosophy and responsibility, any state-imposed religious test is neces-

sarily arbitrary and unreasonable. "The test oath is abhorrent to our tradition." *Girouard* v. *United States*, 328 U. S. 61, 69 (1946). "Test oaths are notorious tools of tyranny. When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people." *Wieman* v. *Updegraff*, *supra*, at 193.

The reasoning of the Court of Appeals that Article 37 establishes a reasonable qualification for notaries public, because they are required to administer oaths, is fallacious. The administration of an oath is a ministerial function. It serves as a certification by a person registered by the state that the affiant has either sworn to or affirmed the notarized statement and hence is subject to the penalty for false swearing if the statement is false and material. Maryland law does not require a notary public to explain the nature of the oath to the affiant. Anno. Code Md. (1957), Art. 68, Sec. 3. Even were there such a requirement, it would not disqualify a person who does not believe in God from making such explanation.[9]

Article 37 of the Declaration of Rights of the Maryland Constitution, by disqualifying from public office those persons who, for one reason or another, cannot conscientiously declare their belief in the existence of God, discriminates against such persons on the basis of their religious beliefs or disbeliefs. Such discrimination by a state is prohibited by the equal protection clause of the Fourteenth Amendment. *Niemotko* v. *Maryland*, 340 U. S. 268, 272-3 (1951); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953), especially Mr. Justice Frankfurter's concurring opinion.

The protection of the Fourteenth Amendment against discrimination, including discrimination on the basis of religion, invalidates state laws and practices which autho-

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9. The Maryland Court of Appeals' rationalization, that Article 37 is justified because notaries public are required to administer oaths, is clearly an *ad hoc* argument. How does this justification explain the applicability of the requirements of Article 37 to all those public officers who are not called upon to administer oaths?

rize the exclusion of persons from public employment on any discriminatory basis.

> • • • constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. *Wieman* v. *Updegraff*, 344 U. S. 183, 192 (1952). See, also *Slochower* v. *Board of Higher Education of the City of New York*, 350 U. S. 551, 556 (1955).

While *Wieman* and *Slochower* dealt with dismissal from public employment on arbitrary and discriminatory grounds, the case at bar involves disqualification from appointment to public office on such grounds. The constitutional safeguards of due process and equal protection apply to both situations. A ground on which a state may not predicate dismissal of one of its employees, likewise may not serve as a basis for refusal to appoint a person to an office of public trust or profit. It is the opportunity to hold public office—including the right to be appointed and the right to continue in office—which may not be abridged by the use of standards that run afoul of the due process or equal protection clauses.[10] The language used by this Court in *Wieman* and *Slochower* surely is broad enough to encompass both concepts.

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10. State statutes forbidding discrimination in employment invariably protect both the opportunity to secure employment and the right not to be discharged because of race, color or religion. For the citation of these state statutes, see Greenberg, *Race Relations and American Law*, pp. 384-5. See also Executive Order No. 10557, prohibiting discrimination in hiring or discharging employees in connection with the performance of work under government contracts. 19 F. R. 5655, Sept. 8, 1954.

Conclusion

The provision of Article 37 of the Declaration of Rights of the Constitution of Maryland, requiring a declaration of belief in the existence of God as a qualification for any office of profit or trust in the State, violates the Federal Constitution.

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